IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

WADDELL E. JOHNSON V. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-A-246 Steve Dozier, Judge

No. M2008-00638-CCA-R3-HC - Filed November 10, 2008

Petitioner, Waddell E. Johnson, appeals the trial court's denial of his petition for writ of habeas corpus. The State has filed a motion pursuant to Rule 20, Rules of the Court of Criminal Appeals of Tennessee, for this Court to affirm the judgment of the trial court by memorandum opinion. We grant the motion and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Davidson County Criminal Affirmed Pursuant to Rule 20 of the Tennessee Court of Criminal Appeals

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Waddell E. Johnson, pro se.

Robert E. Cooper, Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On March 22, 2004, Petitioner entered a *nolo contendere* plea and was convicted of attempted aggravated child abuse and attempted aggravated child neglect. He was sentenced to concurrent eleven year terms in the Department of Correction as a Range I offender.

On January 9, 2008, Petitioner filed a *pro se* petition for habeas corpus relief, essentially alleging that his sentence was illegal because it was enhanced beyond the presumptive minimum sentence in violation of Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham v. California, 127 S.Ct. 856 (2007). The criminal court summarily dismissed the petition, finding that the petitioner's allegation, even if true, did not support a finding that his conviction was void or his sentence expired. The petitioner now appeals.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn.1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. See Summers v. State, 212 S.W.3d 251, 255 (Tenn.2007); Archer v. State, 851 S.W.2d 157, 164 (Tenn. .1993); Potts v. State, 833 S.W.2d 60, 62 (Tenn.1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. See Taylor, 995 S.W.2d at 83. The burden is on the petitioner to establish by a preponderance of the evidence, that the sentence is void or that the confinement is illegal. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn.2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. See Summers, 212 S.W.3d at 260; Hickman v. State, 153 S.W.3d 16, 20 (Tenn.2004).

Initially, the State points out that Petitioner's notice of appeal was not timely filed. The trial court denied Petitioner's habeas petition on February 8, 2008, and the notice of appeal was not filed until March 25, 2008, although the certificate of service indicates that the notice was mailed on February 15, 2008. Even so, Appellate Rule 4(a) provides in pertinent part, "[H]owever, in all criminal cases the notice of appeal document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R.App. P. 4(a). All things considered, we believe that the interest of justice will be better served by waiving the timely filing of a notice of appeal, and we now proceed to the merits of Petitioner's appeal.

In his appellate brief, Petitioner asserts that his sentence has expired because the trial court applied enhancement factors not found by a jury in violation of his Sixth Amendment rights as set forth in Blakely and Cunningham.

Upon review, we note that this court has held that Blakely violations do not apply retroactively to cases on collateral appeal. See, e.g., Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486 (Tenn.Crim.App., at Nashville, Nov. 13, 2007); Timothy R. Bowles v. State, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594 (Tenn.Crim.App., at Nashville, May 1, 2007); James R.W. Reynolds v. State, No. M2004-02254-CCA-R3-HC, 2005 WL 736715 (Tenn.Crim.App., at Nashville, Mar. 31, 2005), perm. app. denied (Tenn. Oct. 10, 2005). Additionally, Blakely and Cunningham have not been applied to cases of negotiated plea agreements. See Hoover v. State, 215 S.W.3d 776, 779-80 (Tenn. 2007); Keith T. Perry v. Turner, No. W2007-01176-CCA-R3-CD, 2008 WL 185810 (Tenn. Crim. App., at Jackson, Jan. 22, 2008), perm. to app. denied (July 7, 2008). We also note that the decisions of Blakely and Cunningham relate to constitutional violations which, even if proven true, would merely render the judgment voidable and not void. See, e.g., Meeks, 2007 WL 4116486; *Bowles*, 2007 WL 1266594; Donovan

Davis v. State, No. M2007-00409-CCA-R3-HC, 2007 WL 2350093, (Tenn.Crim.App., at Nashville, Aug. 15, 2007), perm. app. denied (Tenn. Nov. 13, 2007).

Nothing on the face of the petitioner's judgment indicates that the convicting court was without jurisdiction to sentence the petitioner or that the sentence has expired. As a result, the court's summary dismissal was proper. See Summers, 212 S.W.3d at 260.

Upon review of this matter, this Court concludes that no error of law requiring a reversal of the judgment of the trial court is apparent on the record.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE